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Supreme Court of the United States

October Term 1941

No. 1151

BERNADINE WARREN, administratrix ad prosequendum of the Estate of Harry Edward Warren, deceased,

Plaintiff-Appellant,

against

RICHARD E. HAINES, trading as Annandale Creamery Co.,

Defendant-Respondent.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD J. MACKEY,
Attorney for Petitioner.

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As yet there is no official report of the opinion of the Circuit Court of Appeals, Third Circuit in this case (R., pp. 47-50). No opinion was rendered in the Trial Court.

Supreme Court of the United States

In the Matter of the Petition of BERNADINE WARREN, for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit to bring before the Supreme Court the case of BERNADINE WARREN, administratrix ad prosequendum of the Estate of Harry Edward Warren, deceased, *Plaintiff-Appellant,* against RICHARD E. HAINES, trading as Annandale Creamery Co., *Defendant-Respondent.*	Petition

To the

Honorable Justices of the Supreme Court of the United States of America:

The petition of Bernadine Warren respectfully alleges:

Your petitioner, at the time of the commencement of these proceedings, was and now is a resident of the State of New York, and the respondent is a resident of the State of New Jersey.

This action was brought in the United States District Court for the District of New Jersey to recover damages under the Death Act of New Jersey for the wrongful death of petitioner's husband, Harry Edward Warren, who was killed while riding in a Pontiac automobile which was struck by a milk truck owned and operated by the defendant.

The deceased was a man 34 years of age and his wife, Bernadine Warren, was 30 years of age at the time of his

death. Two children survived—Anita Louise, not quite three years of age, and Roland Edward, eleven months of age.

At the close of the trial in the United States District Court of New Jersey judgment was entered dismissing the action and an appeal was taken from that judgment to the Circuit Court of Appeals for the Third Circuit (R., p. 48). The judgment was affirmed and a petition for rehearing was filed by the plaintiff in that court (R., pp. 50, 51-59). The petition for rehearing was considered and denied on February 10, 1942 (R., p. 61).

Both the District Court and the Circuit Court of Appeals for the Third Circuit usurped the function of a jury in this case and refused to permit the questions of whether the defendant's negligence was the proximate cause of death, and whether the plaintiff's intestate was guilty of contributory negligence to be passed upon by the jury (R., pp. 47-50).

Such action on the part of the court violated the right of the plaintiff under many decisions of the Court of Errors and Appeals of the State of New Jersey, which hold that in a case such as the present the issue of proximate cause and contributory negligence is one for the jury. The rulings of the courts below in refusing to follow the determination of the highest court of the State of New Jersey in this regard flaunts the law as laid down by this court in the case of *Erie RR. Co.* v. *Tompkins,* 304 U. S. 64.

In the opinion of the Circuit Court of Appeals in this case it is ruled that the questions are whether, where a non-suit is granted "the plaintiff's evidence and all reasonable inference which might be drawn therefrom could have supported a finding that the driver of the truck was negligent, and if he was negligent, whether that neligence was the proximate cause of the accident" (R., p. 48).

The collision between the Pontiac car of the plaintiff's husband and the milk truck of the defendant occurred in the morning of August 18, 1939, between 6:30 and 7:00 o'clock (R., p. 48). The Pontiac car was traveling up hill in a westerly direction and the milk truck with a load of 24 tons was coming down hill in an easterly direction on State Highway No. 28 near the Town of North Branch in the State of New Jersey. The accident took place on the straightaway. At the place of the accident the concrete pavement of the road is twenty feet wide and was divided by a white center line into two ten foot sections. The milk truck was 8 feet wide (R., p. 48).

Mr. Hendershot, a witness for the plaintiff, testified that a few seconds before the collision the truck was two feet in from the edge of the road; asked to give a physical demonstration of the distance he indicated somewhat more than three feet. Assuming the physical demonstration to represent the actual distance, the left wheels of the truck must have been approximately one foot over the white center line (R., pp. 48, 16).

This witness resided directly behind the "Friendly Inn" shown at the scene of the accident depicted in Exhibit P1 (p. 15) and had just come there from his home immediately before the crash (R., pp. 13, 14, 15, 16).

The law of the road requires drivers to keep to the right of the center line and the New Jersey statute is in conformity with this rule. The truck was traveling at a speed between 40 and 45 miles an hour; the permissible statutory speed was 20 miles an hour (R., p. 16). Referring to these facts the Circuit Court of Appeals said:

> "In our consideration of the case we have not only accepted the testimony that the truck was three feet from the edge of the road and thus partially over the center line, but have also accepted as a reasonable inference therefrom that there was no

change in its position relative to the center line within the few seconds which elapsed from the time the witness first saw the truck until the collision.

Violations of traffic statutes may be considered by the jury in determining whether the defendant was negligent. Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice. According to the plaintiff's evidence, her deceased husband had all but one foot of his own ten feet wide section of paved road upon which to operate his Pontiac. There is nothing to show that his vision was obstructed or that his side of the road was crowded by other vehicles. There is no evidence that the defendant's truck cut into the path of the Pontiac'' (R., pp. 49-50).

The last few lines of the above quoted opinion show where the court has usurped the functions of the jury.

As a matter of fact the Circuit Court, in rendering that opinion, cites the case of *Podolsky* v. *Sautter,* 102 N. J. L. 598; 133 A. 199 (R., p. 49).

That cited case demonstrates that the court was in error in so usurping the jury's functions because it is a case where a driver ran into a truck which was parked on the highway without any lights. The parked truck was violating the Motor Vehicle Act by failing to exhibit a rear light, and the defendant in that case contended that a verdict should have been directed because his negligence was not the proximate cause of the accident, since the plaintiff's driver admitted that he first saw the truck at a distance of 25 feet away and could stop his car within around six feet at the speed at which he was proceeding. The court there said:

> "But we think this argument is fallacious. Before the judge can take away from the jury the question whether or not the negligence of the defendant is the proximate cause of the injury and determine that question himself, the facts must, not only be undisputed, but the inferences to be drawn from those facts must be such that fair minded men ought not to differ about them. * * *
>
> We think that the mere fact that the driver of the car in which the plaintiffs were riding testified, on cross examination, that he could stop his car within around six feet when going 20 miles an hour, did not render the proximate cause of the accident a question of law for the court, but rather that such question was one of fact for the jury."

In the case at bar, amplifying the facts as recited in the opinion of the Circuit Court of Appeals for the Third Circuit, attention must be called to the physical condition of the automobile of the plaintiff's intestate after the accident when his car was stopped over to the right side of the road in the direction in which he was proceeding (R., pp. 21, 20).

A photograph, marked Exhibit P-3, shows how the whole left side of his car was sheared off, including the running board and the left fender (R., p. 20). The policeman, who came up after the accident, said that the left side was completely torn out of the car; the front end was barely damaged (R., p. 23). The left front fender and left running board of the Pontiac were still on the left front fender of the tractor of the truck (R., p. 24). The tire was off the wheel of the defendant's truck and the whole left front was badly damaged (R., pp. 24, 25).

A photograph of the truck appears in evidence as Exhibit D-5, and this photograph shows that the entire front wheel and axle are off the truck and are being held on the side of the truck when the picture was taken by a chain

wrapped around the axle to hold the wheel in this position (R., p. 22).

There is no evidence whatever in the record to justify the assertion that the plaintiff's deceased husband had all but one foot of his own ten feet wide section of the paved road upon which to operate his Pontiac and that he saw the defendant's truck over the center line within a few seconds which elapsed before the collision.

A few seconds after plaintiff's witness saw the defendants truck partially over the centre line he heard the crash (R., p. 16). When the smash-up happened he saw the Pontiac fly off from the truck to the right side of road (R., p. 18). When the accident happened the Pontiac was away from the center (R., p. 18).

There is no question that the collision was the cause of the death and everything in the case points to the necessity of submitting the issues to the jury and to the error of the courts in dismissing the action without permitting the issues to be passed upon by the jury.

The defendant's negligence is shown as a cause of the collision when it appears that the plaintiff's intestate was on his own side of the center when defendant's truck collided with him (R., p. 18). This is enough to permit a jury to infer that the collision resulted from the wrongful act of defendant in placing his truck on that part of the highway upon which he was forbidden to go.

If a pedestrian on the sidewalk was struck by a truck mounting the curb the negligence of the truck driver would obviously be the proximate cause of the collision. The court would not be heard to say that the pedestrian had nine feet of the sidewalk left to walk on and his view was unobstructed and the truck only mounted the curb to the extent of one foot. The same reasoning applies here.

Reasons for Allowance of the Writ.

Your petitioner respectfully alleges that the present case is one in which it is proper for this court to issue a writ of certiorari for the following special and important reasons:

(a) The Circuit Court of Appeals for the Third Circuit has decided an important question of local law in a way probably in conflict with the applicable local decisions, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(b) The Circuit Court of Appeals has decided an important question of general law probably untenable or in conflict with the weight of authority.

(c) That the United States Circuit Court of Appeals for the Third Circuit, has violated the rule laid down by this court in *Erie RR. Co.* v. *Tompkins,* 304 U. S. 64, in that it has affirmed the ruling of the court below withdrawing from consideration of a jury in a death case the issues of whether the proven negligence of the defendant was the proximate cause of the death, and whether or not the plaintiff's intestate was guilty of contributory negligence, despite the fact that numerous decisions of the Court of Errors and Appeals of the State of New Jersey in similar cases, where the evidence was not as strong as presented here, has ruled that these questions are for the jury.

The various decisions of the State court referred to here will be specified in the brief accompanying this petition. The court has granted certiorari heretofore where it appears that a short statement of

the dominant facts as they might have been found was sufficient to show that the plaintiff had a right to go to the jury.

Simmons v. *Swan*, 275 U. S. 113

and where the correctness of a charge in relation to contributory negligence and proximate cause was involved.

Kansas City So. Railway v. *Ellzey*, 275 U. S. 236.

(c) Because of the importance to plaintiffs in numerous actions for wrongful death of a ruling that where the facts are similar to those in the case at Bar, they are entitled to go to the jury on the question involved and should not have their rights determined by the court.

WHEREFORE your petitioner respectfully prays that this Honorable Court will grant a writ of certiorari in this case to the Circuit Court of Appeals for the Third Circuit, requiring the said United States Circuit Court of Appeals for the Third Circuit to certify the record in this case to this court for its consideration, and that thereon the court will decide the matter in controversy in favor of your petitioner herein, and your petitioner will ever pray.

BERNADINE WARREN,
Petitioner,

By RICHARD J. MACKEY,
Attorney.

RICHARD J. MACKEY,
Attorney for Petitioner.

State of New York, }
County of New York, } ss.:

I, RICHARD J. MACKEY, being duly sworn, say: That I am the attorney for the petitioner herein named, and am familiar with the facts in this matter. I have read and know the contents of the foregoing petition and that the same is true of my own knowledge.

That this petition is made in good faith and not for the purpose of delay.

RICHARD J. MACKEY.

Sworn to before me this
15 day of April, 1942.

ADELE M. O'KEEFE,
Notary Public,
Kings County.
Kings Co. Clerk's No. 106, Register's No. 3017.
Certificate filed in New York Co.
New York Co. Clerk's No. 45, Reg. No. 3-O-20.
Commission expires March 30, 1943.

I HEREBY CERTIFY that I am a member of the Bar of the Supreme Court of the United States, and that I have examined the foregoing petition for a writ of certiorari and that in my opinion the said petition is well founded in law and that the said writ should be issued by this court.

RICHARD J. MACKEY.

SUPREME COURT OF THE UNITED STATES

In the Matter of the Petition of BERNADINE WARREN, for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit to bring before the Supreme Court the case of

BERNADINE WARREN, administratrix ad prosequendum of the Estate of Harry Edward Warren, deceased,
Plaintiff-Appellant,

against

RICHARD E. HAINES, trading as Annandale Creamery Co.,
Defendant-Respondent.

SUPPORTING BRIEF.

Basis for the Court's Jurisdiction.

This application for a writ of certiorari is made pursuant to the provisions of Rule 38, subdivision 5 of the Supreme Court Rules which provides in substance that a petition may be granted where there are special and important reasons therefor: (a) where a Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local conditions; and (b) where the said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; and (c) where the said Court has decided an important question of general law probably untenable or in conflict with the weight of authority.

POINT I.

In disregard of the common law of New Jersey as expressed in several decisions of its highest court herein cited, the Circuit Court of Appeals has approved the refusal of the Trial Court to submit to the jury the questions of proximate cause and contributory negligence.

The Circuit Court of Appeals in its opinion has expressly conceded that the plaintiff has presented sufficient proof to go to the jury in relation to the negligence of the defendant. It recognizes that the defendant's truck was coming down hill at the place of collision, in violation of the statute as to speed, and of the statute which required drivers to keep to the right of the center of the road, and it says that such violations may be considered in determining whether the defendant is negligent (R., p. 49).

So far as the plaintiff's intestate's action was concerned, it is conceded that he was driving his Pontiac car up the hill on the right side of the road and that a few seconds before and at the time of the collision the defendant was on the wrong side of the road, but the Circuit Court although admitting defendant's negligence takes the position that it is a matter of law and not a question of fact for the jury whether, when the deceased had all but one foot on his own ten feet wide section of paved road upon which to operate his Pontiac car he was not obligated to avoid a collision with the defendant's truck which was operated on the wrong side of the road. As matter of law they rule he was so obligated. The plaintiff insists this is a jury question (R., pp. 49, 50).

It is equivalent to saying that where a truck runs up on a sidewalk and strikes a pedestrian, it is a question of law for the court to determine whether or not the sidewalk

was wide enough to impose upon the pedestrian the duty of running away from the point where the truck came upon the sidewalk.

Furthermore, this is an action for wrongful death and under the decisions the question of contributory negligence is expressly reserved for the jury, just as under the decisions the question of proximate cause is reserved for the jury.

Immediately before the Circuit Court proceeds to rule that the question of proximate cause in this case was one for the court, it cites the case of *Podolsky* v. *Sautter,* 102 N. J. L. 598, which expressly says that the question of proximate cause is a question for the jury and not for the court.

A case where a collision similar to the one in the case at Bar was involved is *Parave* v. *Public Service Interstate Transportation Co.,* 109 N. J. L. 155, where there was a collision between a Ford car and a Bus proceeding in opposite directions. The negligence alleged there was an unlawful rate of speed without due regard for the rights and safety of other persons on the highway and negligently operating the Bus on the wrong side of the road so as to cause a collision.

In that case, too, there was only one witness who saw the Bus swing on to the wrong side of the road, and the court said that the testimony of this witness was sufficient to make out a prima facie case of negligence on the part of the operator of the Bus as the proximate cause of the accident.

So in the case at Bar, the testimony of the witness Hendershot was sufficient to make out a prima facie case for the jury as to the proximate cause of the accident.

In the case of *Belperche* v. *Erie RR. Co.,* 111 N. J. L. 81, Chief Justice Brogan of the New Jersey Court of Errors and Appeals, said:

> "This court has stated repeatedly that whether alleged negligence was the proximate cause of the damage done is generally a question for the jury" (p. 84).
>
> In this class of cases where negligence is charged, in that provisions of a statute or an ordinance have been violated, the question for the jury is whether such violation, if it existed, was in whole or part the proximate cause of the accident" (p. 87).

In *Burciar* v. *Public Service Coordinated Transport,* 127 N. J. L. 424, the court said:

> "While in such an action as this a plaintiff must prove circumstances which render it probable and not merely possible, that the defendant was at fault, he is not required to exclude beyond doubt the inference that the damage was due to a cause for which the defendant was not responsible. All that is required is that the circumstances should be so strong that a jury might properly on grounds of probability, rather than of certainty, exclude the inference favorable to the defendant. The test is probability rather than certainty."

In the case at Bar it cannot be disputed that there were plenty of facts in evidence to show that the probable cause of the accident resulted from the fact that the defendant violated the ordinance and that his truck was proceeding down the hill with its front wheels on the left side of the road in the path of the plaintiff's intestate's car (R., pp. 48, 49). This, coupled with the fact that the left side was sheared off his car, and plaintiff's intestate was forced over to its right side of the road, was ample evidence to warrant submission to the jury of the issues in this case, and the court had no right to grant a dismissal (R., pp. 20, 22).

The Circuit Court of Appeals in its opinion completely ignores the case of *Hammersma, Admx.* v. *Smith,* 110 N. J. L. 523, which was most strongly called to its atten-

tion at the time of argument and in the brief below. In that case the evidence was not as strong as the evidence in the case at Bar and yet the Court of Errors and Appeals of the State of New Jersey said that a submission of the issues to the jury was entirely proper, and there was no error in denying a non-suit and directing a verdict.

The court's attention was also called to the case of *Jackson* v. *D., L. & W. RR. Co.,* 111 N. J. L. 487, where there were no eye witnesses to the exact manner in which the death of the plaintiff's intestate was caused. In that case the Court of Errors and Appeals said that there was sufficient evidence to go to the jury, and that there is a presumption against both suicide and negligence (p. 492).

In the case of *Silverstein* v. *Schneider,* 110 N. J. L. 239, the accident involved injuries to the plaintiff by being struck with a truck which ran up on the sidewalk and hit him. This truck was being towed by the defendant Schneider to the garage of its owner. A rope that was being used to tow the truck broke causing the injury. It was claimed that the defendant Schneider was guilty of no negligence which was the proximate cause of the accident—the court said:

> "Whether or not the proximate cause of the injuries was the result of the negligent operation of Schneider or Middleton—or of them both jointly is a jury question and a verdict will not be directed unless the facts are undisputed and the inference one that is so plain that fair minded men would not disagree about it. *Podolsky* v. *Sautter,* 102 N. J. L. 598 (p. 243).
>
> Under the facts developed in this case it was not for the court to say or even suggest what was the proximate cause of the happening. The proximate cause is that affirmative act or omission which directly brought about the happening complained of and in the absence of which the happening complained of would not have occurred. What was the

proximate cause here—the breaking of the tow rope, the failure of the hydraulic brakes, the jerks and starts of the towing automobile, the undue speed, the sharpness of the right hand turn—any one or all of these may answer our question, but under our system of jurisprudence it is for the jury to say and the court properly placed it in their hands for determination" (p. 244).

See also

McKittrick v. *Dugan Bros. of N. J.*, 119 N. J. L. 605-607;

Rizio v. *Public Service Elec. & Gas Co.*, 23 Atl. 2d, 585.

In the case at bar it was not for the court to say on a motion to dismiss whether the plaintiff's deceased husband riding on the right side of the road should have avoided the accident because he had all but one foot of his own ten feet wide section of paved road upon which to operate the Pontiac car (R., p. 49). It was not for the court to say that there was nothing to show that his vision was obstructed, or that his side of the road was not crowded with other vehicles; or that there was no evidence that the defendant's truck cut into the path of the Pontiac (R., pp. 49, 50).

As a matter of fact it is conceded by the court that the defendant's truck was over the center line and on the Pontiac's side of the road at the time of the collision (R., p. 49); an eye witness saw the collision, and it is surely a question for the jury whether that collision was the fault of the deceased, or the fault of the defendant (R., pp. 18, 19).

On the question of contributory negligence in a death case the attention of the court below was directed to the case of *McConachy exec.* v. *Skalerew*, 113 N. J. L. 17, where the Court of Errors and Appeals said:

"In order to justify a non-suit the contributory negligence of the testatrix cannot be in doubt. If,

> however, doubt exists, the determination of the question is for the jury and not for the court. Contributory negligence is a matter of defense and the plaintiff is not required to prove its absence as a part of her case. No presumption of negligence upon the part of the decedent arises in such an action from the mere occurrence of the accident."
>
> *Danskin* v. *Penn. RR.*, 79 N. J. L. 526.

All these cases show that there was a question for the jury and that the courts below have disregarded these cases in violation of their duty.

It is hardly necessary to call to this court's attention the recent case of *Erie RR. Co.* v. *Tompkin*, 304 U. S. 64, where a writ of certiorari was granted because of the importance of the question of whether the Federal Court was free to disregard the rule of the Pennsylvania common law. This court said:

> "Except in matters governed by the federal constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute, or by its highest court in a decision is not a matter of federal concern" (p. 78).

The courts below in the case at bar have completely ignored the rule laid down by the highest court of the State of New Jersey which requires that in a case such as the present the issues of proximate cause and contributory negligence be submitted to the jury.

This court in a contract case granted a writ of certiorari where it was evident from a short statement of the dominant facts as they might have been found that sufficient was shown to entitle the plaintiff to go to the jury.

Simmons v. *Swan*, 275 U. S. 113.

The dominant facts here are that the plaintiff's intestate was proceeding upgrade in a westerly direction at the same time the defendant was proceeding downgrade in an easterly direction with a load of 24 tons of milk (R., pp. 36, 43). Both of the cars were on a straightaway; the defendant was proceeding at a rate of speed of 45 miles per hour, although the local limit at the point was 20 miles per hour, and also had its wheels one foot over the center line of the road in violation of the ordinance requiring defendant to keep to the right of the center (R., p. 49).

The plaintiff's intestate was concededly on the right side of the road and the two cars collided so that the right front wheel of the truck came off and the whole side of the Pontiac sedan was sheared off, causing the Pontiac sedan to go off to its right on the right side of the road and bringing about the death of plaintiff's intestate (R., pp. 18, 20, 22).

If the evidence which was offered by the defendant below is considered, definite questions of fact are injected into the case by the contradictions between the testimony of the plaintiff's witness Hendershot, and the defendant's driver and driver's helper, because both of these men claim that the truck was not over the center of the road, and both had other inconsistencies in their testimony (R., pp. 36-43, 43-45).

It therefore seems clear that the courts below were in error in their refusal to permit the submission of this case to the consideration of the jury.

A recent case in the Court of Appeals of the State of New York is eloquent on the reasons why a case of this character should be submitted to the jury.

Lee v. *City Brewing Corporation,* 279 N. Y. 380.

POINT II.

Because the right to a jury trial is an important right, and because in a death action such as the present the widow and children should not be prevented from having their rights passed on by the jury, the Court should allow a writ of certiorari as prayed for.

Respectfully submitted,

RICHARD J. MACKEY,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1151.

BERNADINE WARREN, administratrix *ad prosequendum* of the Estate of HARRY EDWARD WARREN, deceased,

Plaintiff-Appellant,

against

RICHARD E. HAINES, trading as ANNANDALE CREAMERY CO.,

Defendant-Respondent.

ANSWERING BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI.

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ISIDOR KALISCH,
Of Counsel.

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Supreme Court of the United States

No. 1151.

In the Matter of the Petition of BERNADINE WARREN, for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit to bring before the Supreme Court the case

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Plaintiff-Appellant,

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RICHARD E. HAINES, trading as ANNANDALE CREAMERY CO.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT.

To the Honorable Justices of the Supreme Court of the United States of America:

Basis for the Court's Jurisdiction.

This application is made pursuant to the provision of *Rule 38, Sub-division 5* of the Rules of this Court.

There can be no question of the fundamental authority for the Court's jurisdiction. There is, however, serious

question as to whether or not this Court should be actuated in granting the review sought.

The Court's attention is directed to the fact that this case was tried before the District Court on April 17th, 18th and 22nd, 1941. The record indicates that the trial judge allowed counsel from April 18th to April 22nd to supply him with authorities which would justify the submission of the case to the jury.

The motion for dismissal was granted and, thereafter notice of appeal filed.

The matter was regularly heard by the Circuit Court of Appeals and decided on January 8th, 1942, in an opinion by Judge Maris. This opinion is reported in *126 Fed. 2nd No. 2, 160.*

Thereafter, the very questions presented to this Court were again presented to the Circuit Court of Appeals in a petition for rehearing which was denied on February 10th, 1942. (Record pages 54-61.)

There have been, therefore, thus far, three independent examinations of the facts and they have all been found to be deficient, and we, therefore, respectfully submit that appellant is not entitled to another examination on the same facts, *Page vs. Arkansas Natural Gas*, 286 U. S. 260, 271, Law Edition 1096.

Point I.

The sole question at issue is whether or not plaintiff-appellant presented sufficient evidence to warrant the submission of the question to the jury.

The transcript of the record herein presented approximates 5% of the testimony offered and at the argument before the Circuit Court of Appeals objection was made and the Court finally decided they would hear the oral argument and if necessary would have recourse to the transcript of the evidence on file in the Court.

Perhaps the paucity of testimony printed was caused by a misunderstanding of the new "stream-lined" Rules but it is our contention that an appellant, who seeks a review of evidence upon the assertion that that evidence adduced a question of fact, should be compelled to print all of the evidence and not seek to shift to the respondent the burden of printing the record.

Statement of Facts.

1. On August 18th, 1939, plaintiff's intestate, Harry Warren, was enroute from New York City to Pontiac, Michigan, where he was to meet his wife. Warren was employed by a New York Taxi Cab Company and was operating a Pontiac automobile.

2. Between 6:30 and 7:00 o'clock in the morning plaintiff's intestate was driving in a westerly direction on Route #28, in the Town of North Branch, New Jersey.

3. State Highway #28 is a two lane concrete road; each lane being ten feet in width with a dirt shoulder on either side.

4. Proceeding in an easterly direction on said highway was a tractor and trailer operated by Charles Knowles, originally a defendant. Defendant Haines' truck, operated

by his servant was about 250 feet behind Knowles. (Page 133, Line 8.) The left side of the defendant's truck was about a foot to the right of the center line. (Page 128, Line 24.) About 250 feet from the point of collision, between the Pontiac and defendant's truck there is a sharp curve on Route #28. The collision occurred on a straight-a-way which was practically level. (Exhibit P-3.)

5. As the coal truck approached the curve, the driver, Knowles, saw plaintiff's intestate approaching at a high rate of speed. (Page 103, Line 12.) At that time, plaintiff's intestate was coming around the curve (to his left) and was straddling the center line. (Page 103, Line 11.) His speed was so great that he could not get back on his own side of the road. (Page 103, Line 13.) Knowles pulled his tractor out of the path of the Pontiac but was struck at the back of the tractor and front of the trailer on the left side. (Page 103, Line 6.) Decedent's car bounced off the coal truck and continued west on Route #28 on its own side of the road, then veered to the left and struck defendant's truck. (Page 129, Lines 13-14.) The Pontiac then turned to its right and ran into a ditch on the northerly or its own side of the highway. (Page 84, Line 20.)

6. The impact between the vehicles was very heavy. The left front of defendant's truck flew in the air. (Page 130, Line 8.) The point of impact between the Pontiac and defendant's truck was the left front corner of each. (Page 108, Line 25, Page 109, Line 6.) State Trooper Wallace arrived at the scene before either vehicle was moved. (Page 93, Line 8.) Photographs of the vehicles were taken at the scene within an hour. (Page 97, Line 25.) All the physical facts; marks on the roadway, the damage to the vehicles, etc. plainly point to the fact that the accident happened on

the southerly side of the highway. (Exhibit D-1, Page 106, Line 14.)

Argument.

Apparently, the basis for this petition is an allegation that the Circuit Court of Appeals violated the opinion of Justice Brandeis in *Erie R. R. v. Tompkins,* 304 U. S. 64.

It is rather difficult to grasp the underlying basis for this argument since numerous New Jersey cases are cited by the Circuit Court of Appeals in its opinion. The statement of Justice Brandeis:— "There is no Federal general common law" should not be construed to mean that Federal Judges cannot have recourse to Federal decisions enunciating fundamental principles of law in further elucidation of the reasoning which leads to the conclusion reached. To so contend would be to insist that a local or State judge cannot have recourse to decisions of other States. This is absurd. Indeed, counsel in his brief, at page 17, cites the New York case of *Lee v. City Brewing Corporation.*

Apparently, the insistment in this case is that regardless of the evidence, the trial court cannot control the issue and decide it on the law.

This, again, does violence to a long line of New Jersey decisions. It has been held in New Jersey:

Negligence must be proved as alleged, *Cook v. American Gun Powder,* 70 N. J. L. page 65.

Negligence is never presumed but consists in a concrete act or omission which must be proved, *Wyckoff v. Birch,* 76 N. J. L. 646.

In *McCoomb v. Public Service,* 112 Atl. Rep. 255, the decedent was found dead near tracks on the Hackensack Bridge. There was no further proof. The court said, "Negligence is a fact which must be proved. It will not be presumed. There is always a presumption against negligence."

In *Olson v. Erie R. R.,* 124 Atl. Rep. 367, there was no eye witness to the accident. No one testified to the conditions under which decedent met his death. A witness heard moaning shortly after the train passed a crossing and heard no bell or whistle. The court sustained a non-suit.

The doctrine of "Proximate Cause" applies in New Jersey and has been reiterated innumerable times. An outstanding enunciation of the doctrine is *Morril v. Morril,* 142 Atl. Rep. 337. In the decision of *Martens v. Martens,* 11 N. J. Misc. Rep. 705, the Supreme Court said, "Violation of the traffic act as to speed is not conclusive as to negligence. Even if so, it was not the proximate cause of the accident".

It, therefore, remains to be seen whether or not the plaintiff in this case proved sufficient facts to justify the trial court in sending the case to the jury.

There have been numerous decisions in New Jersey constituting what creates a question of fact. Indeed, the rule is quoted by Judge Maris in his opinion, *126 F. 2d No. 2, page 160, at page 162.* There is a further illustration of the rule in New Jersey as follows: "The credibility of the witnesses and the probative value and weight of the conflicting evidence are for the determination of the triers of the facts, unless the particular witness' testimony is inherently im-

probable or is inconsistent with the common principles by which the conduct of mankind is naturally governed", *Clark v. Public Service,* 86 N. J. L. 144; *Second National Bank of Hoboken v. Smith,* 91 N. J. L. 531; *Sivak v. New Brunswick,* 122 N. J. L. 197.

The plaintiff's entire case on the liability was built around the testimony of the witness Hendershot. The insistment on the part of the appellant is that Hendershot said that defendant's truck was three feet from the edge of the concrete and that the southerly lane was ten feet wide; that the truck itself was eight feet wide, and, therefore, the truck must have been one foot over the center line and traveling at a speed in excess of the legal limit. Upon this hypothesis it is argued that a question of fact is presented. This contention is contrary to the proofs in the case. On direct examination the witness said that the truck was two feet from the edge of the concrete on two occasions. (Pages 44-45.) Then, at the request of the plaintiff's counsel, said that the truck was eight feet wide. This distance was measured on the jury box rail as six feet nine inches. (Page 47.) Then, after the noon recess, on re-direct examination, Hendershot said the truck was two feet from the edge of the road and again stepping to the jury rail, indicated a distance which was measured at three feet. Now, if the witness' verbal testimony or his indication of distance were accepted the defendant's truck would be on its own side of the road at all times, but, counsel for his own purposes accepts the witness' verbal statement as to the width of the truck and his indication of distance of two feet instead of accepting either. Upon such flimsy argument this Court is asked to review the decision of two tribunals who have heretofore examined the record.

It would appear that a witness' idea of distance which can vary one foot in estimating a distance of two feet is certainly incredible, and if his estimate of distance of eight feet is measured at the shorter distance in the morning, his ideas changed considerably after the noon recess. It is inconceivable that a man whose occupation was that of well driller could not estimate a distance of two feet. Indeed, after both counsel in the cause examined the witness, the trial judge took over the examination of the witness and we set forth for the court's convenience the examination of the court:—

"The Court:

The center of road, according to his testimony, as I understand it, is that center line which divides both concrete sections of the road.

The Witness:

That's right.

The Court:

Is that right?

The Witness:

That's right.

The Court:

You didn't see the collision, did you, Mr. Hendershot?

The Witness:

No, I didn't see it happen, I seen—

The Court:

In other words, you saw the truck pass—

The Witness:

Yes.

The Court:

—and shortly after that you heard a noise.

The Witness:

Yes.

The Court:

You looked up.

The Witness:

Yes.

The Court:

And when you looked up was either car, either vehicle, moving at all?

The Witness:

Yes, they were both going off towards the right side of the road.

The Court:

In other words, when you saw the truck and the Pontiac, each traveling in opposite directions, they were veering away from each other, is that right?

The Witness:

That's right.

The Court:

Each to the right?

The Witness:

Each to the right; and that there no more than happened than both of them were stopped.

The Court:

Well, do you know whether either the truck or the Pontiac was on the wrong side of the road?

The Witness:

No, they both looked to be right to the middle.

The Court:

In other words, when you saw them, both vehicles were moving away from the center line?

The Witness:

That's right.

The Court:

you saw it, was on the wrong side of the road?

And as far as you know neither vehicle, at least when

The Witness:
That's right.
The Court:
Is that right?
The Witness:
That's right."

Clearly, the essence of the testimony of the witness Hendershot was not given in response either to his direct or cross examination but upon the impartial examination of the trial court, and, in view of all of the foregoing, it appears that he heard a crash and at the time he heard the crash both vehicles were to the right of the center of the highway, and we, therefore, respectfully submit that Judge Maris' language is dispositive of this case where he says: "There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice".

For all of the above reasons, we respectfully submit that there is nothing in the proofs in this case which should actuate this august tribunal in granting the petition.

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